

1989

Sorensen v. Sorensen : Reply to Brief in Opposition

Utah Supreme Court

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BRIEF

890145

IN THE SUPREME COURT OF THE STATE OF UTAH

ELAINE S. SORENSEN,	:	
	:	Cert. No. 890145
Plaintiff-Respondent-	:	
Cross-Petitioner,	:	Category No. 13
	:	
vs.	:	
	:	
CLIFFORD G. SORENSEN,	:	Court of Appeals
	:	Case No. 870102CA
Defendant-Appellant-	:	
Petitioner-Cross-	:	
Respondent.	:	

REPLY BRIEF IN SUPPORT OF CROSS-PETITION
TO THE SUPREME COURT OF UTAH FOR WRIT OF CERTIORARI

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

ELAINE S. SORENSEN,	:	
	:	
Plaintiff-Respondent-	:	
Cross-Petitioner,	:	
vs.	:	
	:	
CLIFFORD G. SORENSEN,	:	Cert. No. 890145
	:	
Defendant-Appellant-	:	
Petitioner-Cross-	:	
Respondent.	:	

ARGUMENT

- I. THE DISTRICT COURT'S AWARD OF ATTORNEY'S FEES WAS SUPPORTED BY EVIDENCE AND BY A STIPULATION AT TRIAL BETWEEN THE PARTIES, AND THE COURT OF APPEAL'S REVERSAL OF THE AWARD CONFLICTS WITH ITS PRIOR DECISION.

The Utah Court of Appeals determined Ms. Sorensen had adequately demonstrated sufficient need for attorney's fees for trial, but the Court could not determine whether the award of attorney's fees was reasonable. Sorensen v. Sorensen, 769 P.2d 820, 832-833 (Utah App. 1989).

The reasonableness of the attorney's fees was sufficiently established at trial through stipulations between opposing counsel. Those stipulations, as recorded in the trial transcript, are set forth in the Cross-Petition (at 4-6). Ms. Sorensen's attorney proffered the amount of his attorney's fees as itemized on his billing statements (Tr. Ex. V & X) and he was prepared to testify about the underlying justification for them. The district court asked opposing counsel, Mr. Echard, to

stipulate that if Mr. Healy were called as a witness, he would testify his fees were reasonable and they should be awarded to Ms. Sorensen. Although he did not stipulate to the truth of Mr. Healy's testimony, Mr. Echard did stipulate that Mr. Healy would testify if necessary about the reasonableness of the fees.

Even assuming the stipulations reached at trial were not sufficient, the Court may take judicial notice of the reasonableness of attorney's fees based upon material in the record. See Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989); Newmeyer v. Newmeyer, 745 P.2d 1276, 1281 (Utah 1987) (Durham, J. concurring and dissenting). In this case, the record contains Mr. Healy's billing statements received as exhibits at trial. In light of all the evidence and circumstances, Ms. Sorensen should be awarded attorney's fees.

II. BY DENYING MS. SORENSEN AN AWARD OF ATTORNEY'S FEES FOR DEFENDING THE APPEAL, THE COURT OF APPEAL'S DECISION CONFLICTS WITH ITS PRIOR DECISION.

Ms. Sorensen seeks an award of attorney's fees for pursuing the appeal brought by her former husband, Dr. Sorensen. He, in turn, raises (his brief at 8-11) four objections. None of them is compelling.

First, Dr. Sorensen contends an award of attorney's fees by the Court of Appeals is purely discretionary. Although it is discretionary with the Court, under these circumstances it was an abuse of discretion to deny her fees: Ms. Sorensen prevailed at trial and was forced to defend the appeal initiated by Dr. Sorensen; she was the prevailing party on appeal,

requested attorney's fees and the record evidence indicates she is in need of financial assistance. Under identical circumstances in Maughan v. Maughan, 770 P.2d 156 (Utah App. 1989), the Court of Appeals awarded fees on appeal. Not to do so here poses a conflict between the panels of the Court on the same issue, and results in an abuse of discretion in this case.

Second, Dr. Sorensen contends Ms. Sorensen is not entitled to fees because he was successful in obtaining at least a partial reversal of the trial court's decision. Actually, the district court's decree of divorce was upheld by the Court of Appeals on every issue except one: That part of the decree which ordered Dr. Sorensen to pay \$2,000 towards Ms. Sorensen's trial fees. That is not a substantial modification of the decree. Ms. Sorensen is clearly the prevailing party.

Third, Dr. Sorensen contends Ms. Sorensen's request for fees came too late. The objection is simply not true. Ms. Sorensen filed a brief with the Court of Appeals and, among other issues, asked for an award of attorney's fees she had incurred in the appeal. Brief of Respondent at 24. Ms. Sorensen's lawyer repeated the request for fees at the close of his oral argument before the Court. Dr. Sorensen never objected.

Fourth, Dr. Sorensen contends Ms. Sorensen is not entitled to fees on appeal because she did not demonstrate need. Not so. Dr. Sorensen overlooks the only evidence in the record which indicates Ms. Sorensen requires financial assistance for legal services. In any event, the proper approach, having


awarded her fees, is to remand the action to the district court for an evidentiary hearing on the issue of need.

CONCLUSION

Ms. Sorensen asks the Court (i) to grant the Cross-Petition for Writ of Certiorari; (ii) to award her the costs she has incurred in this proceeding; and (iii) to award her attorney's fees she has incurred in this proceeding

DATED: August 17, 1989.

MOYLE & DRAPER, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 1989, I mailed four copies of the Reply Brief in Support of Cross-Petition for Writ of Certiorari to:

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A handwritten signature in cursive script, likely belonging to Kent M. Kasting, is written over a horizontal line.